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IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO OPPOSITION BRIEF.

JURISDICTIONAL STATEMENT.

Res judicata is now asserted as somehow affecting this Court's jurisdiction under 28 U. S. C. § 1254(1). The defense was not asserted below!

Re Napolitano, 401 U. S. 951,[1] was an *ex parte* appeal from respondents' July 14, 1970 order forfeiting petitioner's office. In his "Motion of the Appellee to Dismiss or Affirm"[2] the § 1257(2) appeal, the Illinois Attorney General asserted:

> An issue which appellant raises tangentially concerns . . . consideration by the Courts Commission of Judge Napolitano's invocation of the 5th Amendment privilege against compulsory self-incrimination before the Sangamon County Grand Jury and the contents of his

1. Docketed in this Court December 22, 1970 as No. 70-1151.
2. Page 30 of motion to dismiss—docket No. 70-1151.

grand jury testimony following a grant of immunity to him. These issues are not proper subjects upon which to invoke the Court's appellate jurisdiction as they do not draw into question the validity of any state statute on federal constitutional grounds.

Specifically, the material question in the § 1257(2) appeal was: "Is Section 18, Article VI of the Illinois Constitution and Illinois Supreme Court Rule 51, void for vagueness and impermissibly overbroad under the Fourteenth Amendment?" [p. 8, Jurisdictional Statement; Questions Presented (No. 70-1151)].

When this action was instituted a three-judge district court was convoked under 28 U. S. C. §§ 2281, 2284 to consider the same question concerning validity of the Illinois Constitution and Court Rule 51. [*Napolitano* v. *Ward*, 317 F. Supp. 79, 80.] On July 31, 1970, the three-judge court ruled that the 28 U. S. C. § 2281 challenge "is without merit, i.e., that it does not raise a substantial constitutional question" and "terminat(ed) the three-judge panel and . . . remand(ed) the matter to the . . . district judge before whom the matter was originally filed, for determination of the remaining issues raised by Napolitano's complaint." [317 F. Supp. at 82.]

The single-judge court declared that "the remaining issues" are: (1) "that (petitioner's) removal violated the Fifth Amendment because it was based . . . on the fact that he invoked the privilege against self-incrimination when called to testify before a . . . grand jury" [317 F. Supp. at 84 (Pet. App. 10)] and (2) "that reliance upon (petitioner's) testimony as establishing (impropriety or the appearance of impropriety) . . . violated his privilege against self-incrimination." [317 F. Supp. at 85 (Pet. App. 11).]

Both opinions were appended to our Jurisdictional Statement [*Re Napolitano*, No. 70-1151].

The termination of the §§ 2281, 2284 court rested upon its declaration that the words "for cause" do "not mean removal by arbitrary or capricious action" and that "the cause must be one in which the law and sound public policy will recognize as a cause for his no longer occupying the office." [317 F. Supp. at 81.] Petitioner accepted this as the constitutional standard to be applied by the Seventh Circuit—a standard which would have led to the determination that the only cause under "the law and sound public policy" of Illinois was criminal conviction, i.e.: "after the presumption of (petitioner's) innocence (had been) dispelled by conviction of an infamous crime in a trial court."[3]

Thus, when the Court dismissed petitioner's § 1257(2) appeal the judgment constituted nothing more than indirect approval of the Illinois "statutes" as construed by the three-judge district court below.

Re Napolitano, 401 U. S. 951 (3/8/71), was without benefit of opinion or findings below. The order and judgment of forfeiture is vague, overbroad, ambiguous and duplicitous. Mr. Justice Brennan's observations in *McGautha* v. *California,* 402 U. S. 183, 270 [dissenting opinion] are relevant: "[D]ue process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary actions may be reviewed or corrected." "[W]here federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights."

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3. *People ex rel. Keenan* v. *McGuane,* 13 Ill. 2d at 537, quoted at p. 13, n. 7 of the Petition and section 4 of article IV of the Illinois Constitution, quoted at p. 3 of the Petition.

It was this claim that led the Seventh Circuit to declare that petitioner "has admitted the validity of the 'for cause' standard of removal" [Pet. App. 7] and its conclusion: "We feel the framers of the Canons (of Judicial Ethics) were of the view that separation of the behavior of a judge while off the bench from his conduct in the courtroom is impossible." [Pet. App. 8.]

Petitioner exhausted every means known, to preserve and protect his federally secured rights. Indeed, his very first pleading in the disciplinary proceedings was: "Respondent's Reservation of Rights under 42 U. S. C. §§ 1981, et seq., and 28 U. S. C. §§ 1331 and 1343." [R. (1)19.][4] It stated the principles declared by *Government Employees* v. *Windsor*, 353 U. S. 364, and *England* v. *Louisiana Medical Examiners*, 375 U. S. 411, 419-421, and concluded:

> 375 U. S. pages 420-421, specifies how the waiver is to be avoided.
>
> > 'A party may forestall any (such) conclusion . . . by making on the . . . record the reservation to the disposition of the entire case by the state courts . . . that is he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor* (*Government Employees* v. *Windsor*, 353 U. S. 364) and that he intends, should the state courts hold against him . . . to return to the District Court for disposition of his federal contentions.'
>
> This case presents substantial threshold questions of state law which should be determined in the first instance by the State's judicial forums. Also involved are substantial questions of federal constitutional rights. Exposition of the federal claims is appropriate with regard to consequences which will result, depending on the construction given to relevant state laws. Accordingly, we hereby reserve our federal jurisdictional rights in the manner prescribed by *England* v. *Louisiana Medical Examiners*, 375 U. S. 411, 519-420.

Purely and simply, petitioner was brought to discipline because he "invoked his constitutional privilege against

4. References to the record are by R(1) and R(2) followed by page numbering. R(1) consists of pleadings, motions, etc. R(2) consists of report of disciplinary proceedings—7/7/70 through 7/14/70. The entire disciplinary record is part of the record below. The Attorney General is familiar with these references and followed it in *Re Napolitano*, No. 70-1151—"Motion of the Appellee to Dismiss".

self-incrimination . . . concerning the Illinois State Fair." [Disciplinary Complaint, par. 2; p. 7 of Petition.] His office was taken because of the foregoing "conduct concerning certain concession contracts with the Illinois State Fair." [Commission Order, par 3.] Ever since, respondents have asserted these overbroad ambiguities[5] and have thereby "rendered inefficacious the federal judicial machinery . . . established for the vindication of those rights." [p. 4, *ante*.] At page 3, note 2, of the opposition brief respondents say: "Prior to 1961, the appellant[6] held more than forty-two contracts for concession stands (Tr. 24)"[7] and by this imply "impropriety" rather than "appearance of impropriety" as the cause for forfeiture.

In so doing they raise issues concerning use and derivative use immunity, having constitutional impact of threshold importance. Given the substance of the criminal penalty inflicted, the appearance of criminality as the offense charged and respondents' use and manner of use, of petitioner's forced testimony; the decisions below also conflict with *Boyd* v. *United States*, 116 U. S. 616; *United States* v. *United States Coin & Currency*, 401 U. S. 715; *Kastigar* v.

5. As this Court stated in substance in *Speiser* v. *Randall*, 357 U. S. 513, 526: "How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative"; particularly when "the generality of the standard applied provides but shifting sands on which the litigant must maintain his position."

6. The brief in opposition is essentially a republication of Brief and Argument for Defendants-Appellees in the Seventh Circuit and is reflected by the opinion below.

7. "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." [*Slochower* v. *Board of Ed. of N. Y.*, 350 U. S. at 558.]

United States, 406 U. S. 441; and *Zicarelli* v. *New Jersey Investigating Commission,* 406 U. S. 472.

It is inconceivable that this Court—under the guise of a summary dismissal "for want of a substantial federal question"—would set aside the constitutional principles and decisions in: *Bond* v. *Floyd,* 385 U. S. 116; *Boyd* v. *United States,* 116 U. S. 616; *Malloy* v. *Hogan,* 378 U. S. 1; *Gardner* v. *Broderick,* 392 U. S. 273; *Bouie* v. *Columbia,* 378 U. S. 347; *Giaccio* v. *Pennsylvania,* 382 U. S. 339; *Slochower* v. *Board of Education of N. Y.,* 350 U. S. 551; *United States* v. *United States Coin & Currency,* 401 U. S. 715; *Kastigar* v. *United States,* 406 U. S. 441; and *Zicarelli* v. *New Jersey Investigating Commission,* 406 U. S. 472.

THE QUESTIONS PRESENTED REMAIN THE SAME.

The petition for writ of certiorari presents the case as it is! The disciplinary complaint charges and thus violates petitioner's rights under the Fifth and Fourteenth Amendments in that it is based "on the fact that he invoked the privilege against self-incrimination when called to testify before a Sangamon County Grand Jury." [317 F. Supp. at 84 (Pet. App. 10); see also: par. 2, p. 7 of the Petition.]

Respondents have viewed the question as resting upon the constitutionally required scope of immunity and the opinion of the Court of Appeals states and decides the issue on that basis.

From the relevant constitutional standpoint, the Self-Incrimination and Due Process questions are essentially the same under either point of view. And thus, the "Questions Presented" at pages 2 and 3 of the petition are likewise decisive of the immunity considerations.

SUPPLEMENTAL STATEMENT IN REPLY TO RESPONDENTS' BRIEF.

The case, as stated by the Court of Appeals, does not support the decision reached and corrected logic, inevitably leads to added reasons of substance for granting the writ. In sum, the following facts were found by the Seventh Circuit.

The petitioner was duly elected a Circuit Judge of Cook County in November 1968 and was removed "for cause" on July 14, 1970. [457 F. 2d at 28 (Pet. App. 1).]

He was called as a witness by a grand jury investigating the administration and management of the Illinois State Fair and on the advice of his attorney he refused to answer questions as to business dealings with the State Fair Agency on the claim of the federal privilege against self-incrimination. Thereafter, he was granted statutory immunity[8] from prosecution and compelled to testify. The content of his testimony "related to the procedures whereby (he) secured 42 contracts for concession spaces at the State Fairs for each year . . . 1961 to 1969." [457 F. 2d at 281 (Pet. App. 2-3).]

Immediately after his testimony the petitioner "was named as an unindicted co-conspirator resulting from his dealings with State Fair concession contracts." [457 F. 2d at 283 (Pet. App. 6).]

On February 5, 1970, the respondents invoked their disciplinary power and the petitioner was relieved of all assignments. [457 F. 2d at 282 (Pet. App. 3).]

On March 19, 1970 the formal disciplinary complaint [p. 7 of the Petition] was filed and charged the petitioner with impropriety and the appearance of impropriety in

8. Ill. Rev. Stat. 1969, chap. 38 §§ 106 et seq.; quoted at p. 7, n. 4, Resp. Brief.

violation of Canon 4 of the Canons of Judicial Ethics. [457 F. 2d at 282 (Pet. App. 3).]

"Beginning on July 7, 1970 a formal hearing was had" and "the transcript of (petitioner's) testimony before the grand jury was considered." [457 F. 2d at 282 (Pet. App. 3).] In addition to what the opinion states it is also undeniable that the following procedural rules were explicitly held to apply:

> (1) The Attorney General had the burden of proving the allegations of the complaint by clear and convincing evidence. [Ill. Rev. Stat., Chap. 110A § 51(e).]
>
> (2) The petitioner could not be compelled to give any evidence and his failure to testify could not be considered in any respect. [R. 2, 90, 91, 97.]

"On July 14, 1970 the Courts Commission found" that petitioner's conduct constituted "impropriety" or the "appearance of impropriety" and "cause within the meaning of section 18, article IV of the Illinois Constitution warranting his removal from office." [457 F. 2d at 282 (Pet. App. 3).]

Based on the foregoing, the Court of Appeals held that impropriety and the appearance of impropriety, within the meaning of Canon 4 of the Canons of Judicial Ethics may be established "from the use of (petitioner's) testimony before a grand jury compelled by a grant of full transactional immunity." [457 F. 2d at 281 (Pet. App. 4-5).] The opinion reasons: (1) the constitutionally required scope of immunity must be equivalent "to the traditional declarations of amnesty" and "protect a witness from future prosecution." [*Reina* v. *United States*, 364 U. S. 507, 574; quoted at 457 F. 2d at 283 (Pet. App. 6)]; (2) immediately after petitioner's testimony State Fair officials were indicted and he was charged as a non-indicted conspirator "but he never was or has been subjected to criminal prose-

cution for 'any transaction, matter or thing' arising from the immunized testimony" [457 F. 2d at 284 (Pet. App. 6-7)]; therefore, (3) "the transactional immunity granted (petitioner) by the State of Illinois was co-extensive with his Fifth Amendment privilege against self-incrimination" and the "procedures by which (he) was removed from the office of Circuit Court Judge of Cook County, Illinois, are in accord with the requirements of the Fifth Amendment" [457 F. 2d at 284 (Pet. App. 7 and 8)].

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT.

Given the substance of the criminal nature of penalty inflicted and in light of the principles declared in *Kastigar* v. *United States*, 406 U. S. 441, and *Zicarelli* v. *New Jersey Investigating Comm.*, 406 U. S. 472; the basis for respondents' opposition brief and the decision below raise threshold questions of substance concerning the practical impact of the use and derivative use immunity holdings in *Kastigar* and *Zicarelli, supra.*

On Its Face, the Opinion and Judgment of the Seventh Circuit Overrules Boyd v. United States, 116 U. S. 616, and Conflicts with This Court's Decisions Resting Thereon.

Boyd v. *United States*, 116 U. S. at 634, a civil forfeiture proceeding held that the sole concern of the privilege against self-incrimination "is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' "[9] *United States* v. *U. S. Coin & Currency*, 401 U. S. 715, 718—also a civil

9. As stated in *Kastigar* v. *United States*, ... U. S. ...., 40 U. S. L. W. at 4554, quoting *Ullman* v. *United States*, 350 U. S. 422, 438-439, quoting *Boyd* v. *United States*, 116 U. S. at 634.

forfeiture proceeding—holds that "as *Boyd* v. *United States* . . . makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offenses committed by him* (emphasis is the Court's), though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes. . . . [L]iability is predicated upon a finding of . . . wrongful conduct; in both cases, the Fifth Amendment applies with equal force."

Without resorting to the undenied record for material facts omitted from respondent's brief and the opinion below, the opinion below, on its own findings, are insufficient to support the constitutional judgment reached. In sum:

1. Petitioner's office was taken because of the same conduct alleged in criminal indictments naming him as the non-indicted conspirator and constitutes precisely the same penalty as would have attached had he been indicted, prosecuted and convicted of the offense constituted by the same course of conduct.

2. The finding below and respondent's reason for denying the writ are bottomed on the conduct shown by the indictments and established by the use of the transcript forced by the grant of immunity preventing his indictment.

3. Thus, the disciplinary action was instituted to forfeit petitioner's office by reason of the offense immune from criminal prosecution and the use of his forced testimony led to the infliction of the criminal penalty affixed to the criminal acts or alleged in the conspiracy indictments.

In *esse,* the complex of values embraced within the privilege against self-incrimination [see: *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52] emerge to support our pref-

erence for the accusatorial rather than an inquisitorial system." [378 U. S. at 55.] And in terms of the individual, Justice Harlan declared: "The accusatorial rather than inquisitorial system is a fundamental part of the 'liberty' guaranteed by the Fourteenth Amendment." [*Griffen* v. *California,* 380 U. S. 609, 616.]

Plenary consideration will run right to the heart of the command that "no person shall . . . be compelled in any criminal case to be a witness against himself." [p. 3 of the Petition.] The undenied and undeniable facts are plainly clear in the record and when flushed out, will logically prove that "the privilege" does indeed "serve to protect the innocent who otherwise might be ensnared by ambiguous circumstances." [*Slochower* v. *Board of Education of N. Y.,* 350 U. S. 551, 558-559.]

The constitutional right of a person to remain silent by definition and intrinsic circumstance, constitutes implications of guilt and it would be pure euphemism to contend that the tendency is impeded by such aphorisms as: "The privilege against self-incrimination is a specific provision of which it is particularly true that 'a page of history is worth a volume of logic.' " [*Ullman* v. *United States,* 350 U. S. at 438.]

1. The legal standard here applied is the appearance of criminality.

2. It was charged and established by petitioner's choice not to incriminate himself followed by extrinsic circumstances summing up to the fact that Illinois responds to the federal right against self-incrimination by compelling a witness to testify in exchange for its promise not to prosecute criminally.

3. Petitioner was thus forced to testify *a fortiori,* named as a non-indicted conspirator.

4. In Illinois, the forfeiture of eligibility for public office under the unofficial factors involved here is precluded until "after the presumption of his innocence is dispelled by conviction of an infamous crime in a trial court." [*People ex rel. Keenan* v. *McGuane*, quoted in relevant part at p. 13, n. 7 of the Petition.]

5. At the time the penalty affixed to the appearance of criminality the conduct being penalized had been adjudicated as criminally innocent by the court of criminal jurisdiction.[10]

Thus, if it be the constitutional purpose, as the constitutional purpose it is, that the privilege and the immunity are to "serve to protect the innocent who otherwise might be ensnared by ambiguous circumstances" [supra, 350 U. S. at 558-559] then this case deserves plenary review and a thorough diagnosis of the elements so grossly ambiguous that a totally innocent man is inflicted with the awesome punishment of criminal infamy by use of a specific constitutional provision whose sole concern is to protect the individual against such arbitrary, cruel and unusual punishment—even when it is senselessly inflicted in the high name of ethics.

The reasons for granting the writ are as broadly substantial as the Constitution itself. A simplistic test is as conclusive as the others. *Murphy* v. *Waterfront Commission*, 378 U. S. at 79 declares that the constitutionally required scope of immunity must leave the State and the witness "in substantially the same position as if the witness had

10. Respondents assert "this statement is totally untrue" and thereby imply that criminal charges legally insufficient on their face would be adjudged as a crime were the defendant Judge Napolitano. This "is so incompatible with the genesis of our institutions that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice." [Story's Commentaries on the Constitution, pp. 287-288 (Brown Shattuck, abridged ed., 1833).]

claimed his privilege in absence of a state grant of immunity."[11]

The Courts Commission explicitly ruled that the petitioner could not be compelled to give evidence in the disciplinary proceeding. [8, *ante.*] Thus, the transcript of testimony which had been forced in the prior grand jury investigation did not leave petitioner "in substantially the same position" as he would have enjoyed under the constitutional right of a person to remain silent. Respondents' reason for denying the writ [Resp. Br. 6] and the principle issue [Pet. App. 4-5], decided by the Seventh Circuit cannot be constitutionally sustained and the writ should be granted.

In light of respondents' reliance on criminally innocent impropriety, with regard to petitioner's State Fair dealings, as the reason why the writ should be denied we respectfully request the Court to re-examine part I C-Reasons for granting the writ, [pp. 14-17, of the Petition]. And thus supported, the opinions and judgments below contradict *Giaccio* v. *Pennsylvania,* 382 U. S. 339; *Bouie* v. *Columbia,* 378 U. S. 347.

11. Quoted with approval *Kastigar* v. *United States,* 401 U. S. 441 [32 L. Ed. at 224].

CONCLUSION.

For each and every reason embraced within the petition for writ of certiorari, for the reasons herein suggested and for those intrinsic to notions of justice; a writ of centiorari should issue and after plenary consideration, the Court should vindicate the Constitution of the United States and the human dignity thereby secured to the petitioner.

Respectfully submitted

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